RECORD AND BRIEFS

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No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici are religious and civil-liberties organizations that share a commitment to religious freedom and the separation of church and state. *Amici* believe that public funding causes religious groups to become dependent on governmental largesse and triggers governmental oversight that infringes on religious groups' internal affairs, ultimately corroding and corrupting religion and houses of worship. *Amici* therefore oppose petitioner's effort to force states to fund religious institutions in violation of state constitutional provisions designed to protect religious groups' independence.[1]

The *amici* are:

- Americans United for Separation of Church and State;
- The Anti-Defamation League;
- Central Conference of American Rabbis;
- Hadassah, the Women's Zionist Foundation of America;
- Interfaith Alliance Foundation;
- Jewish Social Policy Action Network;
- Union for Reform Judaism; and
- Women of Reform Judaism.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Each *amicus*'s individual statement of interest is set forth in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized a "play in the joints" between the Establishment and Free Exercise Clauses that permits government to choose not to fund religious institutions even when that funding might otherwise be constitutionally permissible. *Locke* v. *Davey*, 540 U.S. 712, 719-720 (2004). Petitioner asks the Court to all but eliminate that sphere of governmental discretion by limiting *Locke*—and the precedents on which it rests—to decisions whether to provide public funding for the training of ministers.

But the fundamental antiestablishment interests recognized in *Locke* are not so limited. The framers of the First Amendment and of the early state constitutions sought broadly to protect religion against the corrupting influences that could result from public funding—such as inciting unsavory competition for ever larger slices of governmental largesse, encouraging distortions of religious doctrine as churches try to make themselves more attractive to political decisionmakers, and engendering political divisiveness and strife along religious lines. Just as importantly, the framers sought to protect citizens against what they identified as the particular tyranny of being taxed to support houses of worship and religious denominations whose beliefs one does not share.

Missouri chose to avoid those political and social ills, and the injuries to freedom of conscience that ac-

company them, by including the following protections in its Constitution:

- "no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion" (Mo. Const. Art. I, § 6);
- "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; * * * that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship" (*id.* § 7); and
- no state entity "shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or * * * help to support or sustain any private or public school * * * or other institution of learning controlled by any religious creed, church or sectarian denomination whatever" (*id.*, Art. IX, § 8).

The decision of the people of Missouri to leave the support of churches to church members is a valid and important means of protecting the religious freedom of all individuals and all religious denominations. The Court should resist petitioner's invitation to strip Missouri of the ability to vindicate fundamental antiestablishment principles.

ARGUMENT

Missouri's Decision To Provide Discretionary Grants Solely To Nonreligious Organizations Does Not Violate The Federal Constitution.

A. The Free Exercise Clause Does Not Require Missouri To Include Churches In Its Program For Granting Public Funds.

Petitioner contends that every distinction between churches and other entities is constitutionally suspect and must be subjected to strict scrutiny. But that argument is sharply inconsistent with settled principles. If adopted, it would upend firmly established precedent that protects religious belief and religious institutions against the heavy hand of government. And it would require the Court to repudiate the rationale of *Locke* v. *Davey*.

1. The law has long singled out churches for different treatment. The "play in the joints" between the Free Exercise and Establishment Clauses not only gives governmental bodies authority to prohibit funding of religious institutions that may be allowed by the Establishment Clause, but also provides leeway for government to protect religious exercise to a greater extent than the Free Exercise Clause requires. For example, churches are not subject to:

- Legal requirements governing retirement plans under ERISA (29 U.S.C. § 1003(b)(2)).
- Registration requirements under the Lobbying Disclosure Act (2 U.S.C. § 602(8)(B)(xviii)).
- The obligations of nonprofit organizations to register with the Internal Revenue Ser-

vice and submit annual informational tax filings (26 U.S.C. §§ 501(c)(1)(A), 6033(a)(3)(A)(i) & (iii)).

- Title VII's prohibition against religious discrimination in hiring (42 U.S.C. § 2000e-1(a)).

Underlying these instances of distinct treatment are not only interests in protecting religious exercise but also what this Court has recognized to be valid and important "antiestablishment interests" (*Locke*, 540 U.S. at 722) in preventing state involvement in the governance, operation, doctrine, and funding of churches.

Hence, although the Court has in some circumstances upheld against Establishment Clause challenge decisions by States to *include* religious institutions in discretionary grant programs, it has never held, or even hinted, that those decisions were compelled by the Free Exercise Clause. Each of the precedents regarding governmental support on which petitioner relies is grounded in the Free Speech Clause, not the Free Exercise Clause, and concerns access to government-established forums for speech.[2]

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[2] See *Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990) (striking down on free-speech grounds a high school's denial of a student religious group's request to meet on school premises during non-instructional time); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (striking down on free-speech grounds a high school's prohibition of a religious group's use of public-school facilities to show a film after school hours); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (striking down on free-speech grounds a public university's denial of a payment to outside contractors to print a student group's publications); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (striking down a high school's refusal

Petitioner's approach would radically reshape this Court's First Amendment jurisprudence—so that any public funding not *barred* by the Establishment Clause would be *required* by the Free Exercise Clause—and would thereby effectively eliminate any "play in the joints" between the Establishment and Free Exercise Clauses, notwithstanding the Court's repeated reliance on that principle. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005); *Locke*, 540 U.S. at 718-719; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970). Government would, under that view, be prohibited from treating churches differently in spending programs—an approach that, among other things, would invalidate provisions in thirty-nine state constitutions. See Appendix to Brief of Baptist Joint Committee, *et al.*, as *Amici Curiae* in Support of Respondent.

The impact of petitioner's new "mandatory equal treatment" principle would also extend well beyond grant programs. All other differential treatment of churches—including the examples listed above—would likewise become subject to strict-scrutiny review and therefore would be invalid unless required

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to allow religious groups to use school facilities for meetings outside school hours); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (holding that a public university could not exclude a student religious group from meeting in university facilities for the purposes of religious worship or instruction).

Petitioner does not actually contend that Missouri violated the Free Speech Clause. Any free-speech argument has therefore been waived. In any event, any such argument is foreclosed by *Locke*'s holding that the Free Speech Clause did not apply because "the Promise Scholarship Program is not a forum for speech." 540 U.S. at 720 n.3. The claim here—concerning state funding relating to safety of playground facilities—is even more removed from any conceivable speech-related interest.

by either the Establishment or Free Exercise Clauses. That, of course, is the very approach that this Court previously rejected. See, *e.g.*, *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 334, 335 (1987) ("[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference'"; and "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

Nothing in this Court's decisions supports the dramatic expansion of the Free Exercise Clause and dramatic reduction in governmental discretion that petitioner seeks. On the contrary, Missouri's decision not to extend its grants of public funds directly to churches is plainly permissible under the Court's settled precedents.

2. This Court in *Locke* v. *Davey* applied the principles just described to reject a free-exercise claim virtually identical to petitioner's argument here. Although *Locke* involved a scholarship for training as a minister while this case involves funds for maintenance of church property, *Locke*'s rationale precludes petitioner's claim.

The *Locke* Court stated that "the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment." 540 U.S. at 721. And it proceeded to detail the history of these important state "antiestablishment interests," observing that "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was

one of the hallmarks of an 'established' religion." *Id.* at 722.

As *Locke* recognized, the founding generation believed that governmental support harms religion, both because it may produce resentment and religious strife, and because coerced religious activity hinders individual freedom of conscience by substituting compulsion for voluntary adoption of religious beliefs.

These principles found early expression in the theology of Roger Williams, the founder of Rhode Island. Williams explained that for religious belief to be genuine, people must come to it of their own free will. Roger Williams, *The Bloudy Tenent, of Persecution for Cause of Conscience* 28 (1848) ("the church of Christ doth not use the arm of secular power to compel men to the faith or profession the of truth, for this is to be done by spiritual weapons"), reprinted in 3 Complete Writings of Roger Williams (Samuel Caldwell ed., 1963). When government involves itself in matters of religion, Williams warned, the coercive authority of the state impedes this exercise of free will, while also causing bloody civil strife. Thus, Williams taught, keeping church and state separate is crucial both to protect individual religious dissenters against persecution and to safeguard religion and the church against impurity and dilution. See *ibid.*; Edwin Gaustad, *Roger Williams* 13, 59, 70 (2005); Richard McBrien, *Caesar's Coin: Religion and Politics in America* 248 n.37 (1987).

That same view was prevalent at the time of the Nation's founding. For example, Benjamin Franklin explained:

> When a religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support it, so that its professors are obliged to call for the help of the civil power, 'tis a sign, I apprehend, of its being a bad one.

Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), quoted in The American Enlightenment: The Shaping of the American Experiment in a Free Society 93 (Adrienne Koch ed. 1965).

James Madison put it more succinctly: "[R]eligion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), in James Madison, *Writings*, 786, 789 (Library of Am. 1999). See generally Noah Feldman, *Intellectual Origins of the Establishment Clause*, 77 N.Y.U.L. Rev. 346, 356-61 (2002).

These deeply held views are the reason why "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." *Locke*, 540 U.S. at 723.

The *Locke* Court relied on this history to uphold a state scholarship program's statutory exclusion for theology students—an exclusion based on a provision of the Washington Constitution. The Court held that neither the statute nor the constitutional provision was motivated by "animus toward religion"; they instead reflected the "historic and substantial state interest" in ensuring that religious ministries are supported by private money instead of tax dollars. *Id.* at 721–23, 725. Because the burden on religion was

"minor" while the State's antiestablishment interests were "substantial," the law was constitutional. *Id.* at 725.

Petitioner attempts to distinguish *Locke* on the ground that the state antiestablishment interest on which the Court relied is limited to avoiding public funding for the training of ministers. That view is based on a misreading both of *Locke* and of the history on which *Locke* rests.

The state constitutional prohibitions embodying the important antiestablishment interest recognized in *Locke*—and those provisions' underlying history—encompass the use of public funds for the construction or maintenance of church property or for the support of religious instruction. Thus, the Court has explained that "[t]he imposition of taxes to pay ministers' salaries ***and to build and maintain churches and church property*** aroused [the Framers'] indignation. It was these feelings which found expressions in the First Amendment." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 11 (1947) (emphasis added).

Indeed, "the most famous example of public backlash" against governmental support for religion (*Locke*, 540 U.S. at 722 n.6) was the rejection in Virginia of a bill to assess a tax to support the teaching of religion by clergy, and the enactment instead of Jefferson's "Virginia Bill for Religious Liberty." That bill "guaranteed 'that no man shall be compelled to frequent or support any ***religious worship***, ***place***, or ministry ***whatsoever***'" (*ibid.* (emphasis added))—and therefore precluded government from supporting church property or religious instruction.

In keeping with this history, the state constitutional provisions that the *Locke* Court cited as exemplifying antiestablishment interests were not limited to prohibiting the use of tax funds to support clerical training. Instead, they extended to "erect[ing] or support[ing] any place of worship." Pa. Const., Art. II (1776), reprinted in 5 Federal and State Constitutions, Colonial Charters and Other Organic Laws 3082 (F. Thorpe ed. 1901) (reprinted 1993); see also Ga. Const. of 1798, Art. IV § 10 (1789) ("No person within this State shall ever be obligated to pay tith[e]s, taxes, or any other rate, ***for the building or repairing any place of worship, or for the maintenance of any minister or ministry***") (emphasis added); Ky. Const. of 1792, Art. XIII, § 3 (1792) ("[N]o man can of right be compelled to ***support any place of worship*** [and] no preference shall ever be given by law to any religious societies or modes of worship") (emphasis added); S.C. Const., Art. XXXVII (1778) (forbidding "***any tax for the support of churches***") (emphasis added).

The grant sought by Trinity Lutheran implicates the core historical concerns that tax funds not be used to support churches, church property, or religious instruction:

- The grant would be used to improve the physical facilities of a church.
- It would aid a program that involves religious instruction: Petitioner's complaint candidly admits that the grant would aid a preschool that "is a ministry of the Church," "incorporates daily religion * * * into a school and optional day-care program," "teaches a Christian world view to children," and provides "an educa-

tional program structured to allow a child to grow spiritually." Compl. ¶¶ 14-16 (App. 101a). The complaint adds that "[t]he Church use[s] [the preschool] to teach the Gospel to children of its members, as well [as] to bring the Gospel message to non-members." *Id.* ¶ 17 (App. 101a). And the Church expressly refused to sign a required certification on its grant application that the grant "will be used for secular rather than for sectarian purposes." Compl. Ex. B (App. 128a).

- By freeing up church funds to be used for purposes other than the preschool grounds, the grant would aid the Church as a whole.

The *Locke* Court's ruling is thus fully applicable here: "That early state constitutions saw no problem in excluding only the ministry from receiving state dollars reinforces" the conclusion that use of tax funds to maintain church property that supports religious instruction "is of a different ilk." 540 U.S. at 723 (emphasis omitted). "Given the historic and substantial state interest at issue," the denial of funds in these circumstances—like the restrictions on scholarships in *Locke*—is not "inherently constitutionally suspect." *Id.* at 725.[3]

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[3] *Locke*'s conclusion is consistent with this Court' s recognition that a state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools," because the "value of free religious exercise in our constitutional scheme leaves room for 'play in the joints' to the extent of cautiously delineated secular governmental assistance to religious schools." *Norwood* v. *Harrison*, 413 U.S. 455, 469 (1973). See also *Luetkemeyer* v.

2. Petitioner's other attempts to distinguish *Locke* are similarly unavailing.

As in *Locke*, the denial of funding for purchasing recycled tires "imposes neither criminal nor civil sanctions on any type of religious service or rite"; and it "does not deny to ministers the right to participate in the political affairs of the community." 540 U.S. at 720-721.

Neither does Missouri require private individuals to "choose between their religious beliefs and receiving a government benefit." 540 U.S. at 720. To begin with, there is no claim here that Missouri's decision not to grant funds somehow burdens any individual's religious choice. And the Missouri program does not distinguish among religions or condition the availability of public funds on particular religious beliefs. Excluding all churches from eligibility for direct grants of public funds simply does not implicate this concern.

Petitioner also contends (Br. 11-34) that this case differs from *Locke* because it allegedly involves "religious status discrimination"—relying on *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993). But that is the precise claim that the Court considered and rebuffed in *Locke*, "reject[ing

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Kaufmann, 419 U.S. 888 (1974), aff'g mem., 364 F. Supp. 376 (W.D. Mo. 1973) (three-judge court) (rejecting a free-exercise and equal-protection attack on a Missouri statute that authorized free bus transportation for public-school pupils but not for pupils enrolled in church-related schools); *Brusca* v. *State Bd. of Educ.*, 405 U.S. 1050 (1972), aff'g mem., 332 F. Supp. 275 (E.D. Mo. 1971) (three-judge court) (rejecting free-exercise and equal-protection challenge to clauses of Missouri Constitution that prohibited the state from aiding religious but not secular private schools).

the plaintiff's] claim of presumptive unconstitutionality" and refusing to "extend the *Lukumi* line of cases" to the context of governmental grant programs. 540 U.S. at 720. To be sure, this case involves the exclusion of churches from a grant program, and *Locke* did not. But no precedent of this Court requires equal treatment of churches in the distribution of government funds, and many of the Court's decisions make clear that government may treat churches differently from other organizations. There simply is no support for petitioner's claim that differential treatment of churches by itself always triggers strict scrutiny.

What is more, *Lukumi* did not even involve a categorical exclusion of all churches, but rather a claim of *discrimination against a particular religion*: that the plaintiff was singled out for less favorable treatment because of its specific beliefs. 508 U.S. at 534 ("[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances"). There is no claim of such discrimination here.[4]

Similarly flawed is the assertion that *Locke* is inapplicable because the grant program provides funds to purchase surfacing made from recycled tires and therefore provides only "secular and nonideological services" (Becket Am. Br. 11). The

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[4] Petitioner's *amici* also point to *Locke*'s statement that "[n]othing in our opinion suggests that the State may justify any interest that its 'philosophical preference' [to "protect individual conscience"] commands." 540 U.S. at 722 n.5. But as in *Locke*, the interests here are traditional antiestablishment interests—in not funding church property or supporting religious instruction—not novel preferences that have no grounding in history.

program provides a direct grant of state funds, not services. And those funds would go to improve church property for a program that indoctrinates very young children in "the Gospel." If this argument were correct, a state program providing grants for purchases of excess timber would have to include churches—on the theory that the program involved the provision of "wood"—even if the timber were to be used to build a new sanctuary or repair an existing one.[5]

Petitioner also attempts to distinguish *Locke* on the ground that the program there "includ[ed] religion in its benefits" (540 U.S. at 724). But nothing in *Locke* requires all governmental funding programs to do so. Rather, that scholarships could be used at religious universities for some purposes was merely one fact that the Court considered in concluding that the disallowance of payment for theological study did not "evinc[e] * * * hostility toward religion." *Id.* The Court noted that "Washington has also been solicitous in ensuring that its constitution is not hostile toward religion." *Id.* at 724 n.8.

The same is true of the Missouri Constitution: It guarantees "[t]hat all men and women have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences" (Art. I, § 5); "that no person shall, on account of his or her religious persuasion or belief, be rendered in-

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[5] Petitioner imagines (Br. 39) a law generally excluding buses from highway tolls but imposing the tolls on church-owned buses. That highly unlikely legislation is extraordinarily far away from a direct grant of public funds for maintenance of church property supporting religious instruction, which lies at the center of the state antiestablishment interests identified in *Locke*.

eligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his or her person or estate" (*id.*); "that nor shall a citizen's right to pray or express his or her religious beliefs be infringed" (*id.*); "that the state shall ensure that any person shall have the right to pray individually or corporately in a private or public setting" (*id.*); "that citizens as well as elected officials and employees of the state of Missouri and its political subdivisions shall have the right to pray on government premises and public property" (*id.*); "that students may express their beliefs about religion in written and oral assignments free from discrimination based on the religious content of their work" (*id.*); "that no student shall be compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs" (*id.*); "that the state shall ensure public school students their right to free exercise of religious expression without interference" (*id.*); "that no * * * discrimination [shall be] made against any church, sect or creed of religion, or any form of religious faith or worship" (*id.* § 7); that tax exemptions may be provided for religious institutions (Art. X, §§ 6, 6(b)); and even that religious groups have a right to conduct raffles and bingo (Art. III, §§ 39(a), (f)).

What is more, Missouri exempts church-owned childcare centers from licensing requirements applicable to nonreligious providers. Mo. Rev. Stat. § 210.211.

In light of the wide benefits that Missouri's constitution and childcare regulatory scheme provide for religious entities and individuals, and the long-standing antiestablishment interests underlying

Missouri's prohibitions against public funding for churches, no one could reasonably view Missouri's denial of the grant to petitioner as evincing hostility toward religion.[6]

* * *

There simply is no valid basis for reaching a result here different from the one in *Locke*. The Court should therefore hold that Missouri's decision not to grant public funds to a church for the purpose of improving church property used in ministering to preschoolers is entirely permissible under *Locke*.

B. The Constitution Permits States To Avoid The Risk Of Impermissible Religious Entanglement By Deciding Not To Include Churches In Grant Programs.

Direct grants of public funds to churches carry unique costs—and risks of constitutional challenges—not associated with grants to other types of entities. For example, the Court has held that grants of public funds to religious institutions must be monitored to ensure that they are used for the intended, permissible secular purpose. In some circumstances, such as where the funds would be granted directly to

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[6] The State *amici*'s reliance (Br. 13) on *Mitchell* v. *Helms*, 530 U.S. 793 (2000), confirms that petitioner and its *amici* seek to eliminate the play in the joints that this Court has repeatedly reaffirmed: These *amici* would take a plurality decision that merely allowed across-the-board provision to private schools of secular supplies that were stringently restricted to secular uses, and transform it into a new, far-reaching rule requiring state funding of religious institutions even when that funding is issued through discretionary decisions and supports church property that can freely be used for religious instruction and proselytization.

a church, there may be no such permissible secular use. And once government embarks on such grant programs, and awards funds to some religious entities but not others, it becomes susceptible to claims of discrimination among denominations based on religious belief.

States that wish to avoid these serious risks, and the often-significant administrative costs that must be incurred to prevent them, may exclude churches from discretionary grant programs without running afoul of the Free Exercise Clause. That is the essential practical corollary of the "play in the joints" that this Court has repeatedly recognized.

First, direct grants of state funds to a church carry a materially greater risk of impermissible entanglement than when the aid is indirect and flows to an individual rather than the religious entity. *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (observing that "critical to our decisions" upholding tuition-aid grants to students "was the fact that the aid was indirect"); see also *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649 (2002) (internal citations omitted) ("our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals"); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) ("By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents.").

The Court has required government to monitor direct grants of public funds to religious institutions to ensure that the money is not used for religious purposes. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court rejected a facial challenge to a statutory grant program that included religious institutions among its recipients, but cautioned: "[t]here is no doubt that the monitoring of [the] grants is necessary if the [government] is to ensure that public money is to be spent in a way that comports with the Establishment Clause." *Id.* at 615. See also *Agostini* v. *Felton*, 521 U.S. 203, 234 (1997) (discussing monitoring requirement).

Missouri therefore would at a minimum be required to monitor the proposed and actual use of the government funds awarded to churches. And that monitoring would of necessity extend to a number of factors:

- Whether the church property is imbued with religious meaning—for example a playground design may include religious symbols or figures from Bible stories or other religious teachings.
- Whether the church property is or could be used for religious instruction, either because of its design or because religious classes take place there.
- Whether the church property is or could be used for religious ceremonies.
- Whether the church property is otherwise used for religious indoctrination—for instance, if proselytizing is pervasive in the hosted church programs.

- Whether the public funds are actually used for the intended purposes.

These obligations would add substantial costs and administrative burdens to the Missouri program.

Second, even such monitoring may not be sufficient to eliminate the legal risk associated with grants of public funds directly to a church. That is because there is a significant possibility of an Establishment Clause claim when the institution receiving public funds has no separate secular purpose—which plainly is the case when the recipient is a church. And this Court's jurisprudence provides little clarity about the steps that a State should take to prevent such a claim.

Members of the Court have uniformly recognized "special dangers associated with direct money grants to religious institutions." *Mitchell*, 530 U.S. at 855 (O'Connor, J., joined by Breyer, J., concurring in the judgment); see also *id.* at 818 (plurality opinion of Thomas, J.) (internal citation and emphasis omitted) ("we have seen 'special Establishment Clause dangers' when money is given to religious schools or entities directly"). "[D]irect money grants" are "accord[ed] special treatment" because "this form of aid falls precariously close to the original object of the Establishment Clause's prohibition"—"'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 855-56 (O'Connor, J., joined by Breyer, J., concurring in the judgment).

Any governmental entity contemplating such a grant of funds faces a difficult dilemma. Monitor too little, and public funds could be used for impermissible purposes—particularly when the recipient lacks a distinct secular purpose, as is the case when the

funds would be disbursed to a church. Monitor too much, and there is a serious risk of governmental intrusion into and interference with the manner in which the church conducts its internal operations. See *Roemer* v. *Bd. of Pub. Works*, 426 U.S. 736, 765 (1976) (observing that the monitoring necessary for cash aid designed to "subsidize separate secular functions" would have to be so strict that it inevitably would unconstitutionally entangle government with religion).

These concerns are compounded here because the funds would be granted to a church for maintenance of the church's own property—an area in which the Court has recognized the impossibility of distinguishing "secular" facilities from "religious" ones. *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 774 (1973) (holding unconstitutional grants of funds for maintenance and repair of "nonpublic schools, virtually all of which are Roman Catholic schools," because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, ***nor do we think it possible, within the context of these religion-oriented institutions, to impose such restrictions***") (emphasis added).

Thus, wholly apart from the added costs of monitoring, Missouri could well face litigation challenging any grants to churches on Establishment Clause grounds, either because the State's monitoring was ineffective or because it was too intrusive. The Constitution should permit a State to avoid these risks and costs by exercising discretion to exclude churches from its grant program.

Third, government may not discriminate among religious groups. *Church of the Lukumi Babalu Aye*,

supra; *Larson* v. *Valente*, 456 U.S. 228 (1982). Including churches within the grant program would carry the significant risk that Missouri would be subjected to claims of discrimination among churches.

Employing ostensibly secular criteria—such as the number of students served or size of the playground—likely would end up favoring religious groups with larger congregations or greater resources, creating the appearance of favoritism for majority denominations. The problems could be compounded if religious groups that receive grants subsequently claim an entitlement to additional grants for repairs as the playgrounds deteriorate. And even if the State established a random procedure for providing grants, some religious groups would inevitably receive the grants while others would be denied, again favoring some religions over others.

Whatever criteria were adopted, the choice of some churches over others could produce claims of discrimination—particularly if the criteria resulted in the selection of churches belonging to "mainstream denominations" rather than smaller congregations and minority or disfavored faiths.

States should be permitted to avoid the appearance of disparate treatment, inevitable when all applicants are not guaranteed funding, and the accompanying serious risk of constitutional litigation. Missouri's exclusion of churches saves the State from the unsavory—and potentially liability-creating—task of picking and choosing which religious groups get funding and which do not.

For these reasons, as well as those set forth in *Locke*, Missouri's decision to exclude churches from

its grant program is not "inherently suspect" and does not violate the Free Exercise Clause.

C. Petitioner's Erroneous Claims Regarding the Alleged Anti-Catholic Roots of Missouri's Constitutional Provision Provide No Basis For Invalidating The State's Choice.

Petitioner and its *amici* argue that one of the provisions of the Missouri Constitution barring grants of public funds to churches (Art. I, § 7) was motivated by anti-Catholic animus tied to the "Blaine Amendment" and therefore cannot be invoked by the State to exclude churches from the grant program. That contention should be rejected for three reasons.

First, petitioner did not advance this argument before the court of appeals or develop any factual support for its assertions. The argument is therefore waived.

Second, petitioner is wrong as a matter of history. The no-funding principle embodied in constitutional provisions such as Missouri's rests on fundamental antiestablishment concerns relating to avoidance of coercion of taxpayers, protection of churches from government, and prevention of competition among faiths—concerns that substantially predated the Blaine Amendment, as this Court explained in *Locke*. Many of these state provisions were thus enacted long before the Blaine Amendment was proposed. See Brief of Legal and Religious Historians as

Amici Curiae in Support of Respondent, Parts II & IV.[7]

That is the case in Missouri. The State's 1820 Constitution included the predecessor of Article I, § 6—which provides that "no man can be compelled to erect, support or attend any place of worship, or to maintain any minister of the gospel or teacher of religion." See Mo. Const. of 1820, Art. XIII, § 4 (1821). That provision independently precludes the grant of state funds at issue here, and even petitioner does not attempt to tie it to anti-Catholic animus.

The constitutional provision that petitioner does discuss, Article I, § 7, was proposed seven months before the Blaine Amendment, and was merely a revision of a similar clause that had been passed five years earlier—and proposed five years before that. See Mo. Const. of 1865, Art. IX, § 10 (1870); Brief of Legal and Religious Historians as *Amici Curiae* in Support of Respondent, Part V. There simply is no credible evidence linking this provision to the Blaine Amendment or anti-Catholicism. *Ibid.*; see *Locke*, 540 U.S. at 723 n.7 (because "[n]either Davey nor *amici* have established a credible connection between the Blaine Amendment and * * * the relevant constitutional provision," "the Blaine Amendment's history is simply not before us" and the question of religious bigotry "is not at issue in this case").

What is more, the Missouri Constitution's no-aid provisions were re-enacted in 1945, and there is no

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[7] The Blaine Amendment itself arose from such motives, and a desire to protect the public-school system, not predominantly from anti-Catholic animus; indeed, the Amendment was supported by some Catholics. See Brief of Legal and Religious Historians as *Amici Curiae* in Support of Respondent, Part III.

allegation of any anti-Catholic animus at that time. See Mo. Const. of 1945 (1945).

Third, even if, contrary to the facts, the Missouri no-aid provisions could somehow be connected to anti-Catholic animus, petitioner's argument would still fail. This Court's precedents do not support striking down a long-standing law based on an improper, more-than-century-old purpose in the absence of *both* unambiguous historical evidence that the improper purpose was the law's predominant one and a present-day impermissible effect.

Thus, the Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), upheld Sunday-closing laws despite their "strongly religious origin" tied to the Christian Sabbath. *Id.* at 433. The Court reasoned that the challenged "statutes' *present* purpose and effect is not to aid religion, but to set aside a day of rest." *Id.* at 449 (emphasis added).

Similarly, Missouri's no-aid provisions today apply—and are applied—equally to all religious groups and do not single out Catholics. See, *e.g.*, *Mallory* v. *Barrera*, 544 S.W.2d 556, 562 (Mo. 1976) (denying aid to religious schools generally); *Harfst* v. *Hoegen*, 163 S.W.2d 609, 614 (Mo. 1941) (holding that a Catholic school could not be part of the publicly funded school system); *St. Louis Christian Home* v. *Mo. Comm'n on Human Rights*, 634 S.W.2d 508, 511 (Mo. Ct. App. 1982) (noting that an institution run by the Disciples of Christ had been properly denied state funding).

Petitioner's *amici* rely on *Hunter* v. *Underwood*, 471 U.S. 222 (1985); *Lukumi*, 508 U.S. 520; and *Romer* v. *Evans*, 517 U.S. 620 (1996). But the discriminatory Jim Crow laws struck down in *Hunter*

had the purpose and effect of discriminating against African-Americans throughout their history—up to the time of this Court's decision. See 471 U.S. at 227, 229, 233. *Lukumi* and *Romer* involved challenges to laws passed to discriminate against a particular minority that were brought shortly after the laws were enacted—and that had the prohibited discriminatory effect. See *Romer*, 517 U.S. at 627-630, 634; *Lukumi*, 508 U.S. at 534-536.

Excavating ambiguous history that is more than a century old to find suspect intent, and on that basis invalidating laws and constitutional provisions now supported by a legitimate interest and applied in a nondiscriminatory fashion, would allow challenges to a variety of long-accepted laws. Any state or locality that mandates closing of businesses on Sundays would be fair game. See *McGowan*, 366 U.S. at 420. As would laws that prohibit counties from selling alcohol. See, *e.g.*, John Frendreis & Raymond Tatalovich, *"A Hundred Miles of Dry": Religion and the Persistence of Prohibition in the U.S. States*, 10.3 State Pol. & Pol'y Q. 302, 304-05, 314 (2010) ("The existence of dry counties today [is] the legacy of the debate over Prohibition," which was itself "foremost a religious movement.").

In addition, some drug laws might be at risk based on the motives for their original enactment. See Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 Va. J. Soc. Pol'y & L. 43, 82 n.36 (2009) (citing studies linking the passage of marijuana laws to racial animus); Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971,

1012 (1970) ("[T]he result was the same in each legislature—little if any public attention, no debate, pointed references to the drug's Mexican origins, and sometimes vociferous allusion to the criminal conduct inevitably generated when Mexicans ate 'the killer weed.'").

Allowing such challenges would put courts in the position of poring through incomplete and very old historical records to determine what connection, if any, originally existed between a facially constitutional law and improper animus—even if that animus has long since been superseded by a legitimate purpose.

The Court should reject the invitation to open the door to such legal challenges—particularly in a case in which the argument was not advanced below and the history demonstrates the ***absence*** of impermissible motive.

D. Missouri's Grant Program Satisfies The Rational-Basis Standard That Governs Under The Equal Protection Clause.

The *Locke* Court held that, because the challenged scholarship program did not violate the Free Exercise Clause, "rational-basis scrutiny [applied] to [the student's] equal protection claims." 540 U.S. at 720 n.3; accord *Johnson* v. *Robison*, 415 U.S. 361, 375 n.14 (1974) (when a statute "does not violate [the plaintiff's] right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test").

Because Missouri's Scrap Tire Grant Program is not "inherently suspect" under the Free Exercise Clause, petitioner's equal-protection claim warrants

only rational-basis review. It easily satisfies that standard.

The program's limitation of funding to nonreligious organizations has a rational basis. The State's interests are "substantial" (*Locke*, 540 U.S. at 725)—both because of the "historic and substantial" antiestablishment interest recognized in *Locke* and because of the important interest in avoiding entanglement with religion. And the denial of the grant here is rationally related to those interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[*] The representation of *amici* by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDIX

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, DC, that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by this Court, the federal Courts of Appeals, and state appellate courts. Americans United represents more than 125,000 members and supporters across the country. Americans United has long opposed the coercive extraction of taxpayer dollars for the support of religious institutions.

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While traditional-

ly known for its role in developing and supporting health care and other initiatives in Israel, Hadassah is a strong supporter of the free exercise of religion and the strict separation of church and state as critical in preserving the religious liberty of all Americans, and especially of religious minorities.

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

The **Jewish Social Policy Action Network** is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one and in which the resources of the state supported particular organized religious faiths. In Europe, especially, Jews and minority Christian faith communities experienced how the flow of money to religious groups undermined the neutrality of government and exercised subtle but corrupting influence on religious communities. Those who emigrated to America in the nineteenth and twentieth centuries found that America's unique gift to the world was that here one could be both a Jew and an American, a Catholic and an American, even an

atheist and an American. JSPAN believes that the historic balance struck between free exercise and antiestablishment interests is essential to all our fundamental freedoms, and that this Court should not override state restrictions on money being taken from the public treasury to support a church, even if the state law is more restrictive than the Establishment Clause commands.

The **Union for Reform Judaism**, whose 900 congregations across North America include 1.5 million Reform Jews, the **Central Conference of American Rabbis**, whose membership includes more than 2000 Reform rabbis, and the **Women of Reform Judaism**, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of our long-standing commitment to the principle of separation of church and state, believing that it is the bulwark of religious freedom and interfaith amity.